U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 02 August 2006

Case No.: 2006-ERA-00018

In the Matter of

C.M.,
Complainant,

v.

FLORIDA POWER AND LIGHT.
Respondent.

RECOMMENDED ORDER DISMISSING COMPLAINT

This matter arises under the employee protection provisions of the Energy Reorganization Act, 42 U.S.C. § 5851. Complainant filed his current claim on April 27, 2006, alleging that personnel record entries placed in his personnel file by Respondent prior to 1993 "have been affecting me since 1993 until present and I was unaware of them until receipt of OSHA letter dated December 1, 2005 and Deposition on January 23, 2006…" The Occupational Safety and Health Administration ("OSHA"), Region IV, found "there is no reasonable cause to believe that Respondent violated the (Energy Reorganization Act of 1974, as amended, 42 U.S.C. § 5851)"; that the current "complaint was not timely filed"; that the Complainant reiterated the same complaint filed on August 4, 2005 related to not being considered for employment on or about March 11, 2005; and that the Complainant argues that new evidence discovered during the course of a prior hearing on OALJ case number 2006-ERA-00002 permits him to file a new claim.

On April 13, 2006, Administrative Law Judge R.A. Romano issued a "Recommended Order Granting Respondent's Motion for Summary Judgment & Dismissing Complaint" on a claim filed by Complainant on August 4, 2005 alleging Respondent retaliated against him for nuclear safety complaints he filed in November 1994 (ALJ case number 2006-ERA-00002). It is noted that the documents submitted with the current complaint are referenced in the material considered by Judge Romano in his April 13, 2006, Order. Judge Romano's Order addressed the Complainant's allegations of adverse actions by Respondent involving termination of work with Sun Technical in April 2004 and cancellation of a work interview with Sargent & Lundy in 2005. Judge Romano found that the complaint involving Sun Technical was untimely filed and that the Complainant failed to establish a prime facie case of adverse action taken because of engagement in protected activity with regard to the Sargent & Lundy failure to follow through with a work interview in 2005. Judge Romano found that, except for authorized members of the

Speakout program related to nuclear safety, no employee of Respondent had access to Speakout files, including Human Resources department personnel who interacted with Sun Technical and Sargent & Lundy. Judge Romano specifically found that "the adverse information contained in his personnel file amounts to a legitimate, nondiscriminatory reason for refusing to allow to work on Respondent's property (and) has failed to introduce any facts which tend to establish a relationship between Complainant's alleged engagement in protected activity and the adverse employment action taken against him."

In his April 27, 2006, claim Complainant alleges that he is "being hurt" by a September 1988 report of discipline involving sexual harassment, an October 1992 performance evaluation and a January 1993 release questionnaire. There are no specific allegations of such "hurt" other than the matters addressed by Judge Romano in his April 13, 2006, Order.

In response to a July 12, 2006, Order to Show Cause Why Summary Decision and Dismissal of Complaint Should Not be Entered issued by this Administrative Law Judge, the Complainant states that the September 1988 report of discipline, October 1992 evaluation and January 1993 release questionnaire are adverse "actions in retaliation of my nuclear safety complaints to the FPL management (Mr. Renuart, Mr. Hosmer, Mr. Shotwell, Speakout Group) during my last year of work at the Nuclear Engineering Depart. And during my exit interview that took place days after my resignation letter on January 1993." He alleges that the information involving those documents "surface during the investigation and deposition of the Case No. 2006-ERS-00002 and they were not evaluated on that case. Furthermore, this case was appealed per request mail timely on April 24 (Attachment 4 and 5) according with the rules, and I have not received any communication related to it, until now that I have been informed that no appeal is taking place." It is noted that Attachment 4 to the Complainant's response is an undated and unsigned Petition for Review addressed to the Administrative Review Board involving Case No. 2006-ERA-00002 and the same matters raised in the current claim. Attachment 5 is a computer printout indicating package number EQ52 0985 461US was mailed through the U.S. Postal Service on April 24, 2006 in West Palm Beach, Florida, and received in Washington, DC 20210 on April 26, 2006.

In response to a July 12, 2006, Order to Show Cause Why Summary Decision and Dismissal of Complaint Should Not be Entered issued by this Administrative Law Judge, the Employer argues that the doctrine of res judicata and collateral estoppel apply in this case and that the current claim was untimely filed.

Contact with the Administrative Review Board indicates that on April 24, 2006, the Claimant filed a Petition for review of Judge Romano's Recommended Decision.

Federal Regulations provide that under the Energy Reorganization Act (ERA) an individual may file a complaint (emphasis added) alleging discrimination by an employer if the employer "intimidates, threatens, restrains, coerces, blacklists, discharges, or in any manner discriminates" against the employee because the employee notified the employer of a practice unlawful under the ERA or Atomic Energy Act (AEA), refused to engage in any practice made unlawful by the ERA or AEA and identified by the employee, or testified before Congress, Federal or State proceedings regarding a provision of the ERA or AEA. 29 CFR §§ 24.3(a) and

24.2(c). Such complaint must be filed within 180 days after the occurrence of the alleged violation. 29 CFR § 24.3(b) If the complainant disagrees with the recommended decision of the Administrative Law Judge, the complainant must file a petition for review with the Administrative Review Board within ten business days of the date of the recommended decision. 29 CFR § 24.8(a)

In view of all the foregoing, this Administrative Law Judge finds that the complaints alleged in the current claim involved the same parties and issues set forth in the original August 4, 2005, claim addressed by Judge Romano in case number 2006-ERA-00002, now pending appeal before the Administrative Review Board; that the Complainant is not entitled to more than one complaint per alleged violation of the Energy Reorganization Act and Atomic Energy Act; that the current complaint is based on the same alleged violations addressed in the August 4, 2005, complaint; and that the Complainant lacks standing to file the current claim.

RECOMMENDED ORDER

Based on the foregoing, it is recommended that the current complaint be DISMISSED in accordance with 29 CFR § 24.6(e)(4)(B)(ii).

Alan L. Bergstrom
Administrative Law Judge

ALB/dh

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") that is received by the Administrative Review Board ("Board") within ten (10) business days of the date of issuance of the administrative law judge's Recommended Decision and Order. The Board's address is: Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington, DC 20210. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

At the time you file your Petition with the Board, you must serve it on all parties to the case as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8001. *See* 29 C.F.R. § 24.8(a). You must also serve copies of the Petition and briefs on the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

If no Petition is timely filed, the administrative law judge's recommended decision becomes the final order of the Secretary of Labor. *See* 29 C.F.R. § 24.7(d).